IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 7394 of 1999

in

CRIMINAL APPEALNo 358 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

and

MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHAVANI SHANKAR KRIPALDAS MAHESHWARI

Versus

STATE OF GUJARAT

Appearance:

MR NV SOLANKI for Petitioner

MS BR GAJJAR APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH and
MR.JUSTICE H.H.MEHTA
Date of decision: 03/02/2000

ORAL JUDGEMENT

#. Rule. Service of rule is waived by Ms. B.R. Gajjar, ld. APP for the State.

The petitioner herein seeks his release on bail during pendency of this appeal by virtue of S. 389 of Code of Criminal Procedure, 1973.

#. By order dated December 20, 1999 notice came to be issued for the purpose of enabling the State Government to canvass any case for not releasing the present petitioner on bail during the pendency of criminal appeal no. 358 of 1993. The State has not presented any such case except that the petitioner has actually undergone 9 years and 3 months of sentence out of the life sentence awarded to him and that he has yet not completed 11 years of sentence as per one of the categories to be noticed in order dated 29.7.1999 rendered by the Division Bench of this Court (Coram : J.N. Bhatt and H.R. Shelat, JJ) in Criminal Miscellaneous Application No. 2418 of 1999. That submission on behalf of the State has been replied by saying that remission of two years which the petitioner earned pursuant to order passed by His Excellency the Governor of Gujarat under Article 161 of the Constitution of India on the occasion of 50th Anniversary of the Independence of India needs be added so that the petitioner might deserve release on bail during the pendency of hearing of the appeal which is not likely to take place in near future.

#. It is not in dispute that Criminal Appeal No. 358 of 1993 has not been listed for final hearing and there are many appeals ahead of this appeal for hearing pending before the Court. It is also not in dispute that the petitioner stood convicted and sentenced for life on account of homicidal death of his wife, whereas other members of his family who were charged for the same offence were acquitted and the said acquittal appeal being Criminal Appeal No. 1240 of 1993 is also pending, although they are not in confinement. It has also been submitted that the prosecution case was one of circumstantial evidence which resulted into conviction of the petitioner whereas other family members of the

petitioner were acquitted. Mr. Solanki appearing for the petitioner submitted that the defence of the present petitioner was that the wife of the petitioner Pushpaben committed suicide when none of the family members was present at home. We hasten to add here that we do not want to go into the merits of the matter in either of the two appeals. What is important to note from these brief facts is that the State has not come out with any circumstance which would call for any special consideration against the petitioner's release on bail on account of passage of time as per one of the categories appearing in the order passed by the Division Bench in Miscellaneous Criminal Application No. 2418 of 1999.

#. In the aforesaid background the submissions made on behalf of the petitioner as well as the State as aforesaid will have to be considered.

#. In the first place Mr. Solanki referred to the aforesaid order dated 29.7.1999 rendered in Criminal Miscellaneous Application No. 2418 of 1999. That was the application moved by a convict who had already undergone the period of sentence against him on the date when the application reached hearing and it was submitted before the court that the convict was accordingly released and required certificate issued by the concerned Superintendent, Central Jail, Ahmedabad was placed on record. In that background the Bench felt distressed and laid down following categories for issuance of appropriate directions:

1. The convicts who have been imposed and have undergone fixed sentence.
2. The convicts popularly known as lifers and in whose cases they have already undergone custody of detention for actual period of 11 years and more.
3. The convicts who are lifers and who have already actually undergone custody period of five years or more and who as per the jail record, were aged 68 years and more.

The court appears to have called for the particulars of such matters so as to enable the court to take matters of bail or to hear them finally.

We have been told that the directions issued by the aforesaid order have, although not been complied with so far, the Government is working out gathering of the particulars for the above mentioned categories.

#. In the mean time number of bail applications came to be moved by the convict prisoners. This fact will be noticed from another order dated 21.12.1999 rendered by another Bench in Criminal Miscellaneous Application No. 7337 of 1999 in Criminal Appeal No. 520 of 1993 (Coram : M.S. Parikh and H.K. Rathod, JJ). That was a case in which a female convict aged 55 years taking treatment of cancer of uterus as also treatment of tuberculosis was required to move for regular bail under the circumstances set out by her. She had already undergone more than 5 years of actual sentence. In that matter, once again compassionate approach was canvassed as flowing from orders dated 20.10.1999 passed in Criminal Miscellaneous Application No. 6237 of 1999 in Criminal Appeal No. 275 of 1998, dated 7-10-1999 in Criminal Misc. Application No. 5840 of 1999 in Criminal Appeal No. 447 of 1998 and dated 10-8-1999 in Criminal Misc. Application No. 4840 of 1999 in Criminal Appeal No. 361 of 1995. It was observed in that order that when sentence is one of life imprisonment consideration for suspension of sentence could be with different approach. Reliance in that respect was placed on the decision of the Hon'ble Supreme Court in the case of Bhagwan Rama Shinde Gosai v. State of Gujarat reported in 1999 SCC (Cri.) 553. However, it was also noticed that there might be exceptional circumstances requiring consideration at the appropriate point of time for granting bail. Once again same Bench had an occasion to deal with the prayer of grant of bail during the pendency of appeal in Criminal Miscellaneous Application 5929 of 1999 in Criminal Appeal No. 680 of 1994 and while considering the decision of the Honourable Supreme Court in the case of Pritam Singh v. State of Delhi reported in (1999) 1 SCC 169 and the aforesaid order in Criminal Miscellaneous Application No. 2418 of 1999 in Criminal Appeal No. 287 of 1998 this court had an occasion to add one more category, namely, the category of female convicts having undergone actual period of five years and having some other appropriate circumstances linked with such period undergone.

#. In the aforesaid background this court had an occasion to notice four categories of convicts which would merit consideration in so far as their prayer for grant of bail during pendency of appeal is concerned.

(1) The convicts who have been imposed and have undergone fixed sentence.
(2) The convicts popularly known as lifers and in whose cases they have already undergone custody of detention for more than actual period of 11

years.

(3) The convicts who are lifers and who have already actually undergone custody period of five years or more and who as per the jail record were aged 68 years and more.

(4) The lifer female convicts having undergone five years of sentence or more, coupled with appropriate circumstances.

#. The question that is now required to be considered is one with regard to whether in working out actual period for which the convicts have been under confinement remission granted by virtue of order passed under Article 161 of the Constitution of India can also be considered. We hasten to state that there cannot be a rule of thumb or any hard and fast proposition with regard to period undergone, but, we are required to consider this question on a broad proposition while dealing with one of the aforesaid three categories in so far as the present case is concerned.

#. In that light Mr. Solanki learned advocate appearing for the petitioner has first made reference to a decision of the Honourable Supreme Court in the case of Kashmirasingh vs. State of Gujarat reported in 1977 SC 2147. The Apex Court has noticed the practice of not releasing on bail a person who has been sentenced to life imprisonment and has observed in para 2 :

"The appellant contends in this application that pending the hearing of the appeal he should be released on bail. Now, the practice in this Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside,

> but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the minds of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

##. The aforesaid observations will have real bearing on the prayer for bail canvassed by a person who has undergone substantial period of sentence and yet the appeal is not likely to be heard in near future.

##. Reverting then to the question of considering remission granted under Article 161 of the Constitution

of India for being added in the period undergone Mr. Solanki in the first place referred to a Full Bench decision of this Court in the case of Deepakkumar Bhanuprasad Upadhyaya v. State of Gujarat and others 1998(1)-39(1) GLR 1. He has also referred to a couple of decisions of the Apex Court in the case of State of Punjab vs. Joginder Singh reported in 1990 SC 1396 and State of Haryana and others vs. Balwan etc. 1999(4) Crimes 130 (SC). In reply, ld. APP drew our attention to Union of India and others v. Sadhasingh reported in 1990(4) Crimes 263 (SC). Whereas in Union of India and others v. Sadhasingh it has been observed that remissions did not vest any right for release on the convicts undergoing life imprisonment and they are to undergo minimum 14 years of actual imprisonment by virtue of Section 433A of the Cr.P.C., the Apex Court has particularly observed with regard to the position of remissions under Article 161 and 72 of the Constitution of India in Jogindersingh's case (supra) and State of Haryana v. Balwan (supra) and the Full Bench of this Court had an occasion to notice the nature of power under the said two Articles of the Constitution of India in the case of Deepakkumar Bhanuprasad Upadhyaya (supra). In all the aforesaid decisions nature of power under the said articles have been succinctly stated to the effect that this power is absolute and cannot be fettered by any statutory provision such as 432, 433, 433A of Criminal Procedure Code and that the same cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or prison rules. These observations of the Apex Court with regard to the power under Article 72 and 161 of the Constitution of India would render some assistance in working out the period actually undergone, in a matter where during pendency of the hearing of the appeal, bail is sought for. That would be a broad consideration to be borne in mind, unless there are some circumstances which would call for not exercising the power to enlarge such a convict on bail during the pendency of the appeal.

##. What would then be circumstances which would require the attention of the court for not granting bail during pendency of appeal even though the case would fall under one of the aforesaid three categories. We feel aptly guided by the directions appearing in Supreme Court Legal Aid Committee representing under-trial prisoners vs. UNION of India reported in 1994(6) SCC 731. Let such circumstances be noted:

(1) Appropriate amount of bail needs to be fixed bearing in mind the nature of

offence.

(2) Atleast 50% of the bail amount needs to be secured.

(3) The accused should not have undergone less than 50% of the sentence which is liable to be imposed on him.

(4) When the accused is punished under Section 31 and 31-A of the NDPS Act, the under-trial prisoner should not be released on bail by virtue of order passed by the Apex Court.

(5) The under-trial should be directed to deposit his passport.

We observe here that question is one of securing presence of the accused persons at the trial and in so far pending appeals are concerned securing his presence at the time of hearing of the appeal and at the time when the appeal is decided.

(6) It has to be ascertained whether the accused is likely to tamper with the evidence or prosecution evidence, particularly when trial is pending.

We observe here that in cases where conviction is rendered and appeals are pending it has to be seen whether the convict is likely to commit any repeated offence or adversely affect public interest or national interest if he is enlarged on bail.

To what is stated above, we would like to add that care is required to be taken as to whether there is any enhancement appeal in case of life convicts pending because in such a case different considerations would flow when prayer for bail during pendency of appeal has been canvassed on account of passage of time.

##. In so far as the present case is concerned we have already noted the circumstances and the State has not canvassed any of the adverse circumstances for not

granting bail during pendency of the appeal which cannot be heard in near future. The petitioner has already undergone 9 years 3 months of actual sentence whereas two years, if added by virtue of the remission which he earned pursuant to the order passed under Article 161 of the Constitution of India, he has undergone more than 11 years of sentence although there is little chance of hearing of his appeal in near future.

Before passing appropriate order in this application it has to be observed that even in any of the aforesaid classes of cases there might be variety of circumstances which might either call for granting indulgence of enlarging the convicts on bail or which might call for not entertaining the applications for enlarging the convicts on bail during the pendency of appeal even though they fall under any of the aforesaid categories. It would depend on facts of each case.

##. In view of what is stated above, and in the facts of the petitioner's case, following order is required to be passed:

The petitioner shall be released on bail during the pendency of his appeal bearing Criminal Appeal No. 358 of 1993 in the sum of Rs.5000/- (Rupees Five thousand only) with one surety in the like amount on condition that he shall furnish his complete and correct residential address and shall also furnish changed address as and when there is any change in such address to the trial court as well as to this Court, that he shall not leave State of Gujarat without permission from this Court, that he shall remain present as and when required by this court and that he shall surrender his passport, if any, before the trial court. Rule is made absolute in the aforesaid terms. Direct Service is permitted.